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In the Supreme Court of the United States

OCTOBER TERM, 1984

VALERIA REED & MARCELLA ROULAND, CO-EXECUTORS OF THE ESTATE OF VERONICA HANCHER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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v.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that an amendment to Section 2035 of the Internal Revenue Code, enacted on November 6, 1978, which limited the application of the exclusion from the gross estate for certain gifts made within three years of death, cannot constitutionally be applied to gifts made on February 21, 1978. The question presented is substantially identical to that on which this Court denied certiorari in *Fein* v. *United States*, No. 84-182 (Oct. 1, 1984), and *Ceppi* v. *Commissioner*, 462 U.S. 1120 (1983). The decision below is correct, and there is no conflict among the circuits or other consideration warranting further review.

1. Petitioners are co-executors of the estate of Veronica Hancher, who died on December 2, 1978. On February 21, 1978, less than a year before her death, the decedent had given a house in Florida to her seven children. The house

was valued at $44,090, which resulted in a gift of $6,298.57 to each child (Pet. App. 24). On the estate tax return, petitioners reported the seven gifts as transfers made within three years of the decedent's death (*id.* at 12). Under Section 2035(a) of the Code,[1] gifts made within three years of death are includable in the gross estate for estate tax purposes, except as otherwise provided in Section 2035(b).

Section 2035(b)(2), as amended by the Tax Reform Act of 1976, Pub. L. No. 94-455, § 2001(a)(5), 90 Stat. 1848, provided an exception from the general rule of Section 2035(a) for —

> any gift excludable in computing taxable gifts by reason of section 2503(b) (relating to the $3,000 annual exclusion for purposes of the gift tax) * * *.

Relying on this exception, petitioners subtracted $3,000 from the estate tax value of each of the seven gifts, taking the position that only $3,298.57 of each gift was includable in the gross estate (Pet. App. 12). Petitioners' interpretation of the statute may be called the "subtraction out" method (*ibid.*).

On audit, the Commissioner disallowed the $21,000 exclusion claimed by petitioners, and, by reason of that and other adjustments,[2] asserted an estate tax deficiency in the amount of $21,513 (Pet. App. 11-12). The Commissioner noted that Section 2035(b)(2), as enacted in 1976, permitted the exclusion of "any gift" excludable in computing taxable

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended and in effect for the period at issue (the Code or I.R.C.).

[2]The other adjustments related to Section 2013 of the Code, which concerns the estate tax credit for prior transfers. The courts below rejected petitioners' contentions on this score (Pet. App. 13-14, 18-23, 29), and petitioners do not pursue those contentions here.

gifts for gift-tax purposes. He read these words to permit exclusion of specific gifts of small (*i.e.*, under $3,000) value, such as Christmas gifts and birthday presents. This interpretation of the statute may be called the "de minimis" method (Pet. App. 12). Because each of decedent's $6,298.57 gifts exceeded $3,000, and because none of the gifts in their entirety was "excludable in computing taxable gifts" for gift-tax purposes, the Commissioner determined that the Section 2035(b)(2) exception was unavailable and that petitioners had understated the decedent's gross estate by $21,000.

In 1978, Congress amended Section 2035(b)(2) to make clear that it intended to enact the "de minimis" method of computation employed by the Commissioner here. Revenue Act of 1978, Pub. L. No. 95-600, § 702(f)(1), 92 Stat. 2930. That amendment, captioned "Clarification of the $3,000 Annual Exclusion From the Rule Including in Gross Estate Transfers Within 3 Years of Death," revised Section 2035(b)(2) to provide an exception from the general rule of Section 2035(a) for —

> any gift to a donee made during a calendar year if the decedent was not required * * * to file any gift tax return for such year with respect to gifts to such donee.

Because a donor at that time was required to file a gift tax return if he gave any donee more than $3,000 annually, the 1978 amendment made it clear that executors were required to include in the gross estate the entire amount of any larger-than-$3,000 gift, not just the amount by which such a gift exceeded $3,000. The Act was signed by the President on November 6, 1978, and the amendment to Section 2035(b)(2) was given the same effective date as the 1976 version of the statute. The 1978 amendment, in other words, was made effective with respect to estates of decedents dying after December 31, 1976, in connection with gifts made after that date. Revenue Act of 1978, § 702(f)(2), 92 Stat. 2930.

In 1980, Congress decided to permit executors to elect the "subtraction out" method, instead of the "de minimis" method, for gifts made during 1977. Technical Corrections Act of 1979, Pub. L. No. 96-222, § 107(a)(2)(F)(i), 94 Stat. 223. According to the Committee Reports, the reason for permitting this election was that "[t]he legislative history [of the 1976 version of the statute] was somewhat ambiguous," ambiguity that arguably persisted until October 1977, when the House Ways and Means Committee first considered the clarifying change to Section 2035(b)(2). S. Rep. 96-498, 96th Cong., 1st Sess. 86-87 (1979); H.R. Rep. 96-250, 96th Cong., 1st Sess. 66 (1979). See H.R. 6715, 95th Cong., 1st Sess. § 3(f) (1977); H.R. Rep. 95-700, 95th Cong., 1st Sess. 73-74 (1977).

2. Petitioners paid the asserted deficiency and filed a claim for refund. They contended that Section 2035(b)(2), as it read on February 21, 1978, when the decedent made her gifts, permitted exclusion from the gross estate of $3,000 per donee even though annual gifts to that donee exceeded $3,000. And they contended that the 1978 clarifying amendment could not constitutionally be applied to gifts made before its enactment.

Following the Commissioner's denial of their claim, petitioners filed this refund suit in the United States District Court for the Central District of Illinois. The district court found no need to resolve the dispute as to the proper reading of the 1976 version of Section 2035(b)(2) (Pet. App. 27). Rather, it followed *Ceppi* v. *Commissioner*, 698 F.2d 17 (1st Cir.), cert. denied, 462 U.S. 1120 (1983), which held that there was no constitutional impediment to applying the 1978 amendment to gifts made earlier in 1978 (Pet. App. 27-29).

The court of appeals unanimously affirmed (Pet. App. 11-23). Like the district court, it found "the clear language of the [1978] amendment to be controlling," and it saw no

need to determine the proper method of calculation prescribed by the 1976 version of the statute (Pet. App. 16). It rejected petitioners' constitutional arguments, noting that "[r]etroactive features are applied to revenue statutes as a matter of customary congressional practice," and that "[a] mere change in an existing tax, as opposed to the creation of an entirely new tax, is not unconstitutional *per se*." *Id.* at 17 (citing *United States* v. *Darusmont*, 449 U.S. 292, 296-297 (1981) (per curiam)). The court concluded that the 1978 amendment — which "did not create a new tax but rather increased the amount of the gift which would be included in the decedent's gross estate" — was not "so harsh or oppressive as to be invalid," particularly since gifts in contemplation of death have been subject to estate tax to a greater or lesser degree "since the Revenue Act of 1916" (Pet. App. 17-18).

3. The decision below is correct. To challenge the court of appeals' holding, petitioners would have to show (a) that the 1976 version of Section 2035(b)(2) permitted use of the "subtraction out" method, and (b) that the 1978 amendment, clearly mandating use of the "de minimis" method, could not constitutionally be applied to gifts made earlier that year. Petitioners have demonstrated neither.

a. Although petitioners assert (Pet. 6-7, 13) that the 1976 version of the statute permitted them to subtract out the first $3,000 of larger-than-$3,000 gifts, that assertion is highly questionable. In the first place, the text of the statute is hostile to their view. It spoke of an exclusion for "any gift"; petitioners, however, do not seek to exclude "any gift," but rather the first $3,000 of a much larger gift.[3] The

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[3]The gift tax statute, by contrast, which does provide for the computational method petitioners favor, has always phrased the exclusion in terms of a dollar amount, rather than in terms of "any gift." See, *e.g.*, I.R.C. § 2503(b) (providing annual gift tax exclusion for "the first $10,000 of such gifts"); 26 U.S.C. (1976 ed.) 2503(b) (same, for the first "$3,000 of such gifts").

legislative history of the 1976 Act, moreover, explains that the exception provided by Section 2035(b)(2) — that is, the exception from the general rule that gifts within three years of death must be included in the gross estate — was provided "on the basis of administrative convenience." Staff of Joint Comm. on Internal Revenue Taxation, 94th Cong., 2d Sess., *General Explanation of the Tax Reform Act of 1976*, at 529 (Comm. Print 1976). This explanation is consistent with the "de minimis" interpretation adopted by the Commissioner, since, absent such an exclusion, an executor would have to inquire into every birthday gift of a handkerchief or necktie, every wedding gift of a toaster or percolator, indeed every snack given to neighborhood children by the decedent during the last three years of his life — a rather burdensome undertaking that would yield little revenue gain. On the other hand, no burden whatever would be imposed on executors by requiring them to report the entire amount of larger-than-$3,000 gifts as part of the gross estate, since Section 6019 already required that a gift tax return be filed with respect to such transfers.

There is thus ample reason to believe that the Tax Court in *Ceppi* was correct in holding that the 1976 version of the statute required use of the "de minimis" method employed by the Commissioner here. 78 T.C. 320 (1982). Although the First Circuit on appeal disagreed with that determination (698 F.2d at 19-20), relying instead on retroactive application of the 1978 amendment, the proper construction of the 1976 statute, contrary to petitioners' assertion (Pet. 13), was not "established" with any finality by the First Circuit's decision. At best, as Congress itself stated, the 1976 statute was "ambiguous." S. Rep. 96-498, *supra*, at 86-87; H.R. Rep. 96-250, *supra*, at 66.

Given the ambiguity of the 1976 statute, the meaning attributed to it by the immediately succeeding Congress should be dispositive. "Of course, the view of a later Congress does not establish definitively the meaning of an earlier enactment, but it does have persuasive value." *Bell* v. *New Jersey*, 461 U.S. 773, 784 (1983). And that persuasiveness approaches its apogee when the later Congress is the immediately succeeding Congress which, recognizing an ambiguity in the legislation of its predecessor, promptly resolves the ambiguity by an amendment that it entitles a "clarification." Revenue Act of 1978, § 702(f) (92 Stat. 2930). This Court has regularly held that the Secretary of the Treasury, pursuant to authority delegated to him by Congress under Section 7805 of the Code, may issue regulations construing tax statutes — whose meaning is not infrequently debatable — effective retroactively to the statute's date of enactment. *E.g., Dixon* v. *United States*, 381 U.S. 68 (1965); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 184-185 (1957); *Helvering* v. *Reynolds*, 313 U.S. 428 (1941). Congress's action in itself resolving an ambiguity is entitled to comparable deference. Cf. *Brooks* v. *Dewar*, 313 U.S. 354 (1941); *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297 (1937); *Graham & Foster* v. *Goodcell*, 282 U.S. 409 (1931).

b. In any event, even if one were to accept petitioners' construction of the 1976 statute, the constitutional argument they advance is without substance. To begin with, the 1978 amendment was enacted on November 6, 1978, and was thus effective at the time of decedent's death on December 2, 1978. This Court has regularly held that an estate tax provision effective at the date of death "does not operate retroactively merely because some of the facts or conditions upon which its application depends came into

being prior to the enactment of the tax." *United States* v. *Jacobs*, 306 U.S. 363, 367 (1939); *United States* v. *Manufacturers Nat'l Bank*, 363 U.S. 194, 200 (1960).

And even if it be thought that there was an element of retroactivity here, this Court has repeatedly held that "a tax is not necessarily and certainly arbitrary and therefore invalid because retroactively applied" (*Milliken* v. *United States*, 283 U.S. 15, 21 (1931)). In *United States* v. *Darusmont, supra*, this Court upheld the application of a November 1976 amendment to the Code's minimum tax provisions — decreasing the exemption and increasing the tax rate — retroactively to January 1, 1976, noting that the amendment "did not create a new tax" but merely enlarged the tax base of an already existing tax (449 U.S. at 300). The same is true here.

Here, moreover, as in *Darusmont*, the decedent "had ample advance notice" (449 U.S. at 299) of the clarifying change Congress eventually enacted. The Report of the House Ways and Means Committee gave public notice in October 1977 of the "ambiguity" Congress perceived in the 1976 statute, and of how the Committee proposed — effective as of December 31, 1976 — to resolve it. See H.R. 6715, 95th Cong., 1st Sess. § 3(f) (1977); H.R. Rep. 95-700, *supra*, at 73-74. That public notice was given four months before the decedent, in February 1978, made the gifts at issue. Under such circumstances, this Court has regularly held that there is no constitutional impediment to making a statute effective at least from the date of public notice. *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, No. 83-245 (June 18, 1984); *United States* v. *Darusmont*, 449 U.S. at 299-301; *United States* v. *Hudson*, 299 U.S. 498 (1937).[4]

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[4]Petitioners also complain (Pet. 20-28) that Congress, in the Technical Corrections Act of 1979, § 107(a)(2)(F)(i), eventually permitted executors to elect the "subtraction out" method for gifts made in 1977,

4. Contrary to petitioners' contention (Pet. 7, 27-28), finally, the decision below does not conflict with *Untermyer* v. *Anderson*, 276 U.S. 440, 445-446 (1928). As the court of appeals correctly noted (Pet. App. 18), that case is distinguishable because it involved the retroactive application of the first gift tax — a wholly new tax enacted in 1924 — to irrevocable transfers made prior to the law's effective date. That is not the situation here, for Congress in 1978, if it changed the law at all, merely changed the tax base of an existing tax. Nor is there any conflict among the circuits on the question presented, for the decision below is fully in accord with *Fein* v. *United States*, 730 F.2d 1211 (8th Cir. 1984), cert. denied, No. 84-182 (Oct. 1, 1984), and *Ceppi* v. *Commissioner*, 698 F.2d 17 (1st Cir.), cert. denied, 462 U.S. 1120 (1983), the only other appellate decisions on point.

Nor is there any conflict between the decision below and *Hemme* v. *United States*, No. 83-5069 (S.D. Ill. Jan. 23, 1985). The district court in that case declared an October 4, 1976, amendment to another provision of the estate tax — Section 2010(c), governing computation of the "unified credit" where the decedent had previously claimed a $30,000 "specific exemption" from gift tax for certain gifts — unconstitutional as applied to gifts made on September 28, 1976.[5] The *Hemme* case has little to do with the instant

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an election that was not permitted for gifts (like decedent's) made in 1978. But Congress, recognizing that an ambiguity existed at least until the Ways and Means Committee Report was published in October 1977, acted entirely reasonably in providing relief in the form of an election for gifts made before October 1977 and for a short time thereafter. Such line-drawing is a function of legislation, and there was no constitutional requirement that Congress extend such relief indefinitely. *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 (1970).

[5]The government filed a notice of appeal from the district court's decision in *Hemme* on February 21, 1985. Pursuant to an extension of time granted by Justice Stevens, the government's time to docket an appeal in this Court runs until June 21, 1985. The Solicitor General has not yet decided whether to authorize the filing of a jurisdictional statement in *Hemme*.

case, since it involves a different Section of the Internal Revenue Code with a wholly different purpose and legislative history.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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